DIGEST

LITERATURE

Aboriginals

O'Connor, P., 'Aboriginal land rights at common law: *Mabo v Queensland*', (1992) *Mon.LR* 251.

Upton, J.C.R., 'By violence, by silence, by control: the marginalisation of Aboriginal women under white and "black" law', (1992) *MULR* 867.

Administrative law

Paterson, M., 'Legitimate expectations and fairness: new directions in Australian Law', (1992) 18 *Mon.LR* 70.

Potter, J.C., 'Adjudication by Social Security Appeals Tribunal: a research study', (1992) *Anglo-American LR* 341.

Criminology

Brown, I. and Hullin, R., 'Contested bail applications: the treatment of ethnic minority and white offenders', (1993) *Crim.LR* 107.

Dinnen, S., 'Big men, small men and invisible women – urban crime and inequality in Papua New Guinea', (1993) *ANZ J Crim.* 19.

Easteal, P.W., 'Homicide between adult sexual intimates: a research agenda', (1993) *ANZ J Crim* 3.

Fairall, P.A., 'Criminal cases in the High Court of Australia: legal representation (Dietrich)', (1993) *Crim. LJ* 102.

Naffine, N., 'Windows on the legal mind: the evocation of rape in legal writings', (1992) *MULR 741.*

Discrimination law

Kelly, J., 'Age and sex discrimination: recent cases here and in New York', (1993) *NLJ* 466.

Mossman, M.J., 'Gender equality and legal aid services: a research agenda for institutional change', (1993) *Syd.LR* 30.

Human rights

Nnaemeka-Agu, Justice, 'The role of lawyers in the protection and advancement of human rights', (1992) *CLB* 734.

Women and law

Hocking, B.A., 'Feminist jurisprudence: the new legal education', (1992) *MULR* 727.

Neave, M., 'From difference to sameness: law and women's work', (1992) *MULR* 768.

Otto, D., 'A barren future? Equity's conscience and women's inequality', (1992) *MULR* 808.

ESTHER CHO

Esther Cho is a Melbourne lawyer.

CASE LAW

Administrative law

Whose idea of reasonable?

The doctrine of reasonableness in delegated legislation was recently considered in *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 112 ALR 211, a case challenging a management plan for the South Eastern Fishery on the ground that a formula for calculation of a fishing quote was irrational. The fisher was successful at first instance and on appeal in the Federal Court of Australia. At first instance, the test of unreasonableness was whether 'no reasonable person could ever have devised [the plan]'. On appeal, the rationale of unreasonableness as a ground of judicial review was linked to the need for reasonable proportionality between the object of a head of power and the means selected by a law made under it to achieve that object. Some cases and commentary which the court cited differ on whether 'reasonableness' was to be tested beside what a 'reasonable person' or what a 'reasonable administrator' would think. This difference was not addressed by the appeal court, the majority of which simply held that the conclusion reached at first instance was open to the judge. Approval by the court of some commentary suggests that in the court's view the ground would extend to administrative decisions as well as to delegated legislation, aside from the particular provisions of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

Crime

Double jeopardy in English courts

In *R v Dabhabe* [1993] QB 329 the defendant submitted to summary trial before a magistrate on a charge of dishonestly obtaining 6000 pounds by falsely representing himself as the payee of a cheque. The defendant was further charged with theft of the same amount. The prosecution offered no evidence in support of the first charge before the magistrate and it was dismissed. The magistrate committed the defendant to a jury trial on the theft charge. At the trial the defendant pleaded that he had already been acquitted of the offence contained in the indictment (*autrefois acquit*). The defendant was found guilty and sentenced to eight months imprisonment. The defendant appealed unsuccessfully. The English Court of Criminal Appeal dismissed the appeal because in its view it could not be properly said that the defendant had ever been at jeopardy of conviction on the first charge.

The Privy Council reached a similar decision in *Richards v R* [1993] AC 217, on appeal from the Court of Appeal of Jamaica. The defendant was charged with murder, but entered a plea of guilty to manslaughter which was accepted by the prosecution with the judge's approval. An adjournment was granted to permit the defendant to call character witnesses in mitigation of sentence. The prosecution decided to discontinue those proceedings and commence fresh proceedings by again charging the defendant with murder. When the hearing resumed it entered a *nolle prosequi*. When the defendant was tried on the second indictment for murder he was convicted and sentenced to death. He appealed. The Privy Council dismissed the appeal, holding that a plea of *autrefois convict* must be based on judicial proceedings which resulted in both a finding of guilt and passing of sentence. So, in this case there had been no final adjudication of the first charge which would justify the plea. It was considered appropriate to commute the death sentence.

Cellular telephones not 'private' in Quebec

A defendant to bookmaking charges challenged Crown evidence gathered from intercepted cellular telephone conversations. The Quebec Municipal Court considered that such communications are *not* made in circumstances in which it is reasonable to expect that they will *not* be intercepted by any other person. Therefore the accused's conversations were not 'private communications' and were admissible regardless of whether or not the interception had been authorised by a court (*R v Solomon* (1992) 77 CCC (3d) 264).

Unconscious victims and sentencing considerations

A full bench of the Nova Scotia Supreme Court unanimously allowed a Crown appeal against a lenient sentence in a case of sexual assault on an unconscious victim.

> The circumstances of this offence involved the commission of a sexual assault upon a victim who was completely defenceless. She neither struggled nor resisted because by reason of her condition those options were not open to her. The sentence imposed by the trial judge does not reflect the repudiation and abhorrence which we must, on society's behalf, express with respect to such conduct.

(*R v Sarson* (1992) 77 CCC (3d) 233, 240)

MURRAY RAFF

Murray Raff teaches law at the University of Melbourne.